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PUBLIC UTILITIES
BOARD OF PUBLIC UTILITIES

Regulations of Cable Television
Definition of Complaint
Adopted Amendment: N.J.A.C. 14:18-1.2

Proposed: October 18, 2004 at 36 N.J.R. 4674(a)

Authorized by: Celeste M. Fasone, Director, Office of Cable Television (with approval of the Board of Public Utilities, Jeanne M. Fox, President; Frederick F. Butler, Commissioner; Connie O. Hughes, Commissioner and Jack Alter, Commissioner)

Filed: _____ as R. ____ d. _____, without substantive changes and thus not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3)

Authority: N.J.S.A. 48:5A-10, 48:5A-26.1

BPU Docket Number: CX04070612
Proposal Number: PRN 2004-395

Effective Date: May 2, 2005
Expiration Date: December 27, 2006

The purpose of this rulemaking is to define the term "complaint."

On September 20, 2004, the Board of Public Utilities authorized publication of a new rule, N.J.A.C. 14:18-6.7, based upon N.J.S.A. 48:5A-26.1, which requires the State's cable television operators to collect, retain, present for inspection and submit data on complaints received from their customers. The rule became effective upon publication in the New Jersey Register on October 18, 2004. While in the course of adopting that rule the Board determined that a definition of complaint was necessary. The Board, on September 20, 2004, authorized publication of the herein adopted amendment of a definition of complaint. The proposed amendment was published in the New Jersey Register on October 18, 2004, at 36 N.J.R. 4674(a).

A public hearing on the proposed definition was held on November 22, 2004. Notice of the hearing was published in nine daily newspapers whose general circulation covers the State. In addition, all cable television operators and interested parties listed with the Office of Cable Television (OCTV) under N.J.A.C. 1:30-5.2(a)3 were mailed a notice of the hearing.

Summary of Hearing Examiner's Recommendation and Agency Response:

The public hearing was held on November 22, 2004 at the Offices of the Board of Public Utilities in Newark, New Jersey. Two persons offered testimony at the public hearing: Ava Marie Madeam, Division of Ratepayer Advocate (DRA) and Karen Alexander, New Jersey Cable Telecommunications Association (NJCTA). Legal Specialist Edward D. Beslow served as

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hearing officer. The hearing officer recommended that this rule action proceed to adoption. Four commenters submitted written comments during the public comment period: the NJCTA, CSC TKR, Inc. d/b/a Cablevision (Cablevision), WVT Communications (WVT) and the Township of Mahwah (Mahwah).

A record of the public hearing is available for inspection in accordance with applicable law by contacting:

Board of Public Utilities
Office of the Secretary
Attn: Docket No. CX04070612
Two Gateway Center
Newark, NJ 07102

Summary of comments received at the public hearing and in writing and Agency response:

COMMENT: The Board should adopt an alternate definition of complaint to that proposed. The Board's proposed definition would require the recording and reporting of information so vast as to make the information collected be of little utility. Therefore, the Board should adopt a definition of complaint that would read: "[a]ny written or verbal contact with a cable television operator by a customer in connection with a subscription for a cable television service in which the customer expresses dissatisfaction with an act, omission, product or service that is 1) within the (cable television) operator's control; 2) regulated under state or federal law and 3) is not readily addressed by the (cable television) operator." (NJCTA)

RESPONSE: The Board believes that its definition of complaint is reasonable and considered. Different definitions would lead to differing conclusions restricting the intent of the statute. The Board does not believe that the definition of complaint should contain language which would allow the cable television industry to define complaint as any contact that is not "readily addressed" by the cable television operator. The term "readily" is vague and limiting in affording customers the right to file grievances with their cable television operators on issues that they find unacceptable. In addition, the Board does not believe the definition should be limited to only those matters that are within the jurisdiction of State or federal law. Further, to limit complaints to those areas that are within the cable television operator's control is to unduly limit the Board's jurisdiction in responding to its statutory mandate to report all consumer complaints to the Legislature. Additionally, the Board believes that the Legislature is interested in what its constituents complain about so as to respond appropriately with legislative initiatives.

The Federal Communications Commission (FCC) in one of its fact sheets, "Where to File Complaints Regarding Cable Service," issued in July of 2000, states that a cable television company has control over programming, carriage of FM and AM radio stations and charges for pay-per-view and pay-per-channel programming, and therefore complaints regarding these matters should be directed to the cable television company. The FCC further states that if the complainant is not satisfied with the result, he or she should contact the local franchising authority (LFA), in this case, the Board. The Board believes that these types of complaints are an important indicator of how well the cable television company handles its complaints and inquiries as well as being a measurement of how many of these complaints are passed on to

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the Board as the LFA. The Board is confident that most of the time the customer will be satisfied upon the initial complaint to the cable television operator, but without any empirical data, it cannot be certain. Also, as noted in the adoption notice for N.J.A.C. 14:18-6.7, at 36 N.J.R. 4833, the Board observed that the FCC allows LFAs to record comments regarding programming. Furthermore, the FCC itself receives complaints on programming and other issues that are not regulated by it or any LFA and does not consider these categories beyond its or an LFA's scope.

COMMENT: The proposed definition goes beyond what is required by law, what has been required for cable television operators and lifeline utilities, what is traditionally done by cable television operators across the country and what is required in practice by any other local franchising authority. (NJCTA)

RESPONSE: The Board believes the rule is important to consumers, the Board and the OCTV, as well as to the Legislature insofar as it provides a single definition of "complaint." As noted above, without this definition, which the Board believes is appropriate, each cable television operator could define "complaint" as it sees fit and then the companion rule, N.J.A.C. 14:18-6.7, would not be as useful in analysis of complaints. The definition is appropriate because the Board believes it captures the full universe of what a customer may complain about rather than censoring consumer complaints by restricting the common everyday definition of "complaint."

COMMENT: The language of P.L. 2003, c.38, upon which the subject rule, N.J.A.C. 14:18-6.7 and this companion rule, is predicated, is nearly identical to the OCTV rule which has been in existence since 1990. The rule, found at N.J.A.C. 14:18-6.5, requires each cable television operator to maintain for a period of one year, "a record of complaints in regard to service received at its office or offices, which shall include the name and address of the subscriber, the date, the nature of the complaint, the test conducted and corrective action taken if required, and the final disposition." The only aspect that differs is that the legislation requires an annual report be made to the Board and the Legislature characterizing the number and types of complaints cable television operators receive. Therefore, the definition is overly broad and the Board has provided no exposition of factual information to support the rule proposal. (NJCTA)

RESPONSE: The rule proposal is predicated on the fact that in the course of the adoption of N.J.A.C. 14:18-6.7 the Board found that the cable television industry and the Board use a significantly different definition of what constitutes a complaint. The cable television industry believes that a complaint is only a complaint once it goes beyond an initial point of contact with the cable television operator. The Board disagrees and believes that if a customer calls and states that he or she has a complaint; it should be registered as a complaint whether or not the cable television company can resolve the issue without further intervention. Therefore, the Board believes that if a customer has a complaint when he or she calls, it must be recorded and reported by the customer service representative (CSR), and not only once the complaint gets escalated.

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COMMENT: The dictionary definition of complaint is only appropriate for interpersonal communications in its broadest context but cannot be applied to the current circumstances. Every industry has its own lexicon that includes terms that have one meaning in common usage and another in within the specific context of the industry, profession or government operation in which it is being used. For example, "complaint" in the context of a legal proceeding does not have the same meaning of the dictionary definition and even within the context of the legal system the definition of complaint varies in the civil versus criminal courts. (NJCTA)

RESPONSE: To the extent that words used in different circumstance in different industries may have different definitions, the Board agrees that the definition of complaint may vary but that a dictionary definition of complaint may not fit. Indeed, the Board has not proposed a "dictionary definition" of complaint. Instead, the proposed definition reflects the public's understanding of the term and correlates to the way the industry's customers use the word. Thus, the definition of complaint proposed is appropriate for the cable television industry. The definition of complaint, which the Board based on a plain English reading of the term "complaint," will cover all situations when a customer makes an expression of dissatisfaction or discontent. The Board is very mindful of the legislative objective "to promote and encourage harmony" between cable television companies and their customers (N.J.S.A. 48:5A-2(c)4. Forcing a narrow and highly technical definition on the public would move away from that objective.

COMMENT: The Board's lifeline utilities are not subject to a definition of complaint. They are only required to report those complaints referred to the company by the agency; a less stringent requirement than the one with which the cable television industry has complied with for years. (NJCTA)

RESPONSE: The cable television industry has not consistently complied with reporting those complaints referred to it by the Board, which was part of the problem the OCTV experienced when trying to adopt the companion to this rule, N.J.A.C. 14:18-6.7. There are at least two significant recorded instances when one of the State's cable television operators failed to even report the complaints forwarded to it by the OCTV. This behavior is not compliant with any rule. Therefore, in keeping with what it believes is the letter and spirit of the legislation, the Board herein adopts the definition of complaint as proposed rather than permitting the cable television industry to report only those complaints that they cannot cure.

COMMENT: The cable television industry was canvassed to determine what common practice is. The regulatory practice of other jurisdictions was also reviewed. No other jurisdiction required recording and reporting of complaints pursuant to a definition such as proposed under this rulemaking. Other jurisdictions surveyed all considered the goal in mind and determined that a narrower classification of complaints was sufficient and appropriate. (NJCTA)

RESPONSE: The Board believes its definition of complaint is appropriate for this jurisdiction and adopts it as proposed.

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COMMENT: The complaint definition if adopted as written will increase operational costs because cable television companies will need to hire additional personnel to handle calls which may drive up wait times and make it more difficult to comply with the requirement to answer 90 percent of inbound calls within 30 seconds, pursuant to N.J.A.C. 14:18-7.8. If a customer service representative (CSR) needs to spend valuable time categorizing calls determining if a call is a complaint, it takes time away that should be spent assisting a customer. This time should not be spent figuring out whether the call is a complaint and then recording that complaint. If additional personnel are needed, more space, desks, telephones and computers will be needed, which in turn will come with attendant costs. (NJCTA)

RESPONSE: The Board does not believe that its complaint definition rule will have a significant impact on call answering times by CSRs. While the cable television industry may need to adjust codes under which it records calls received by the public, it is the Board's understanding that cable television operators routinely record calls under a variety of codes for classification purposes. As noted in the proposal notice for this rule, at 36 N.J.R. 4674, Cablevision CSRs already are able to record 32 separate journal entries for when a credit is issued to a customer. The Board believes that the complaint mechanism should function in a similar way but instead of entering one of 32 journal entries for a credit, for example, the cable television operator can enter one of 15 entries required by the form prescribed by the Director of the OCTV. The Board believes that some of the journal entries used by Cablevision and other cable television operators may be able to be used for one of the Board's complaint designations as well with very little modification.

COMMENT: Wait time at walk in centers will increase because currently, a customer can drop in and exchange a remote without having a CSR look up the customer's account. If the complaint definition is adopted as written, CSRs will need to assess whether the customer believes the remote is defective and is complaining about it. (NJCTA)

RESPONSE: Whether or not a converter exchange at a walk-in center qualifies as a complaint depends on the customer's claims.

COMMENT: Service calls and installations may take longer as well, which could jeopardize the requirement to meet the four-hour appointment window mandated by Board at N.J.A.C. 14:18-3.12. (NJCTA)

RESPONSE: The Board sees no logical nexus between the process for logging complaints at the office and the amount of time it takes to make a service call or perform an installation.

COMMENT: The costs attendant with the training, hiring and additional equipment that may be necessary for this rule will not provide policy makers insight into customers' real experience with their cable television operator. All the definition, in conjunction with its companion, N.J.A.C. 14:18-6.7, will do is provide the cable television operator's competitors, the unregulated satellite dish industry, with a way to compete against it by showing how poor a job the cable television

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industry is doing in the State, regardless of whether the snapshot of the industry is correct or not. (NJCTA)

RESPONSE: Insofar as the Board must require the cable television industry to record and report complaints pursuant to P.L. 2003, c. 38, it shall. The Board disagrees that the complaint statistics will not provide a snapshot into how well a cable television operator is performing; as noted above and below, if the cable company receives a significant number of complaints but the Board receives a great deal less, it should indicate that the cable television company is resolving those complaints satisfactorily without government intervention.

COMMENT: The definition will only illustrate how strongly a customer feels about an issue, not whether that customer is making a complaint. Two people can call about the same issue—for example, not knowing how to block out adult programming content—but if one expresses dissatisfaction, it would be registered a complaint, while if the other person did not, it would not be. (NJCTA)

RESPONSE: It is within the statutory requirements of the Board to expect the State's cable television operators to record as a complaint a customer who calls expressing "discontent or dissatisfaction with an act, omission, product, service, service content or complement, term or condition of service" in accordance with the definition adopted herein. In addition, if a customer calls about not knowing how to block out adult programming, while it may be because he or she did not read the literature provided, it also may be a result of poor customer education; that is, the customer was not provided enough information during the installation process. The Board believes that would be a legitimate complaint.

COMMENT: The proposed definition of complaint, to the extent it includes subscriber concerns regarding programming content, runs afoul of the First Amendment guarantees of the United States Constitution and the free speech guarantees of the New Jersey Constitution. The broad definition of complaint proposed by this rule would necessarily include customer expressed concerns regarding content of programming, control of which is beyond the cable television operator and regulation of which is beyond the reach of the Legislature and the Board. Placing monetary penalties and enforcement actions on cable television operators for failing to record and report content-based complaints infringes on New Jersey cable television operators' First Amendment Rights. In addition, the result will be likely that cable television operators will restrict the programming that they carry if they believe it will generate complaints. (NJCTA)

RESPONSE: The Board does not believe this is a relevant comment and disagrees with the argument that complaint collection violates the cable operators' First Amendment Rights. The complaint definition rule and its companion, N.J.A.C. 14:18-6.7, do not impose or enforce any restriction on content or programming by cable television operators nor does the rule place penalties on context. That is why the Board believes this comment is not relevant. If any First Amendment issue is to be made it is that their comments suggest cable television operators wish to suppress customers' expressions of dissatisfaction as provided for under this definition. In addition, as noted above, the FCC allows LFAs to take complaints on programming and the FCC itself records and reports programming complaints. Furthermore, the cable television

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industry offers no legal or factual basis for such a tenuous and speculative assertion that reporting of such aggregate data is constitutionally protected.

COMMENT: The proposed definition of complaint imposes a content-based financial burden on the airing of programs likely to provoke controversy and generate at least some customer expressions of dissatisfaction. Allowing complaints to be filed will generate complaints. (NJCTA)

RESPONSE: The legitimacy of the complaint process goes back to what was recognized in the original 1972 State legislation. The Board does not believe that generation of expression of dissatisfaction is a significant factor in determining whether to air a program by a cable television operator. It is the Board's and the OCTV's experience that a cable television operator will carry programming it chooses subject to contract requirements. The OCTV receives complaints regarding the type of programming carried by cable television operators and while typically these complaints are out of the purview of the Board, this does not preclude the Board from addressing its statutory mandate. As the rule in question is being promulgated pursuant to the Board's interpretation of statute, and since the Legislature did not limit complaints to certain types of complaints, the Board believes that the Legislature wanted to see all complaints and not just those that the cable television industry views as legitimate. To limit the types of complaints would be to issue immunity not articulated in the statute.

COMMENT: The effect of the Board's definition of complaint would be to burden expressive activity by deterring cable television customers from voicing complaints about content shown on their cable television systems. Because of the Board's requirement, pursuant to N.J.A.C. 14:18-6.7, that a customer make a determination whether it wants to release its personally identifiable information to the Board or not, a customer that has consented to release his or her personally identifiable information to the Board may be reluctant to express dissatisfaction over programming content because they would not want the government to know what programming they were watching or their views regarding a particular program. (NJCTA)

RESPONSE: The Board disagrees. In the OCTV's experience, customers with adult pay-per-view movie complaints that they claim that they did not order do not hesitate to file complaints. It should be noted that the release of personally identifiable information is only to provide the Board and the OCTV with a mechanism to verify complaint statistics, not to publish or release the personal information of a complainant. In fact, that information would not be provided to the Board/OCTV unless specifically requested. In addition, a customer may give or withdraw his or her consent to release his or her name, address, contact information and category of complaint at any time, including at the time that he or she makes a complaint if he or she is uncomfortable with release of the information to the Board.

COMMENT: Even if the Board's rule were to be considered content neutral it could only be sustained under the First Amendment "if it advances government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to

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further those interests.” (Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189 (1997)) (NJCTA)

RESPONSE: This rule is content neutral. The Board does not believe that a record of programming complaints is a suppression of a cable television operator’s free speech.

COMMENT: Under Federal law, neither the Legislature nor the Board has any lawful interest in regulating or overseeing the content of programming distributed by the cable television operator. Therefore, the Board has no lawful interest in regulating the manner and means by which a cable television operator responds to content related expressions of dissatisfaction from its customers. To the extent that the proposed rule is designed to advance the government’s interest in ensuring adequate and responsive customer service by the State’s cable television operators, then its proposed definition of complaint burdens more speech than necessary to further that interest. The Board can exclude content related expressions of dissatisfaction and other areas that are beyond the control of the cable television operator and the regulatory reach of the Board from the definition of complaints subject to its recording and reporting requirement and still vindicate its interest in ensuring adequate and responsive customer service. (NJCTA)

RESPONSE: This rule does not regulate the manner and means by which a cable television company responds to content complaints. The subject rule, N.J.A.C. 14:18-6.7, is a reporting rule—a diagnostic tool in meeting the statutory mandate to address conflict between cable television companies and their customers. Exclusion of particular kinds or complaints does not present a complete picture of problems in the relationship between cable television companies and customers.

COMMENT: The comments filed by the NJCTA, including the proposed revised definition, will meet the needs of the OCTV and allow the cable television companies in the state to report complaints in a timely manner without major investments and should be acted upon accordingly. (Cablevision, WVT)

RESPONSE: The Board notes Cablevision and WVT’s comments in support of the NJCTA’s comments. The Board has responded to the NJCTA’s comments above.

COMMENT: The proposed definition will have more of an effect on complaint recording and reporting on small cable television systems than on larger ones. For example, a cable television system that currently has only ten CSRs will have a greater challenge meeting even the NJCTA revised definition due to the additional recordkeeping requirements. The Board should consider offering a small system exemption (fewer than 5000 customers) from the revised rule. (WVT)

RESPONSE: The Board does not believe that it is appropriate or necessary to make an exemption for small systems as suggested by WVT. The Board believes that the burden on a cable television company will be proportional to its size. Therefore, because a company such as WVT has fewer customers, it will offset the fact that it only has a few CSRs, while a very

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large company such as Cablevision or Comcast will have greater personnel numbers at their disposal and will be better equipped to handle the larger volume of complaints it will receive.

COMMENT: WVT is facing stiff competition from other cable television systems and from satellite dish companies. Any additional rules that require existing resources be taken away from providing the highest quality service will be counterproductive and will not benefit cable television customers. (WVT)

RESPONSE: A cable television operator can file for relief from a rule that it can demonstrate creates circumstances which result in an undue burden. In the absence of that showing, however, the Board does not see a significant burden associated with this rule.

COMMENT: The broad definition of complaint proposed by the Board and the OCTV should be adopted because it will ensure that all subscriber concerns are identified. This will assist the Board and the OCTV in gauging whether cable television operators in New Jersey should be subject to increased service quality standards if complaints of poor service continue to increase. (DRA)

RESPONSE: The Board appreciates the DRA's comment in support of the rule.

COMMENT: Complaints must be recorded at the initial point of contact and not only on an escalated basis, as argued by the cable television industry. The proposed definition will ensure that all complaints received by the cable television operators are recorded, which will better enable the Board and OCTV to get a more accurate picture of the types of complaints registered by consumers. (DRA)

RESPONSE: The Board agrees with the DRA that the complaint definition is necessary as written and believes that it will help the Board and the Legislature to compile a more accurate picture of the types of complaints registered by consumers.

COMMENT: New Jersey ratepayers will greatly benefit from this proposed amendment because it will require the identification of all customer complaints regarding the services received from cable television operators. In addition, these reports will determine whether additional service quality standards are needed. (DRA)

RESPONSE: The Board acknowledges the DRA's comment in support of the rule.

COMMENT: In order for municipalities and the OCTV to monitor the performance of cable television operators in the State, it is important to capture customer concerns about service regardless of cause and regardless of whether the complaint was satisfactorily addressed by the "first line" CSR. The cable television industry's policy to only document complaints that are escalated, meaning that the customer's call went beyond the first line CSR, is not acceptable

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because it fails to document the number and nature of grievances made by the customer. A call to register dissatisfaction is on its face a complaint. If the party calling does not request a supervisor, this does not mean a complaint was not registered. (Mahwah)

RESPONSE: The Board appreciates Mahwah's comment in support of the rule. The definition of complaint, as herein adopted, will achieve the purposes set forth in Mahwah's comment.

COMMENT: Municipalities review the complaint statistics logged for a subscriber area when considering whether to renew a franchise. The cable television industry should not be permitted to unilaterally adopt a definition that minimizes the recorded complaint entries because that would unfairly portray customer satisfaction or dissatisfaction and would take advantage of the fact that the cable television industry is not a fully competitive marketplace. (Mahwah)

RESPONSE: The Board appreciates Mahwah's comment in support of the rule. The Board notes here, however, that while statistics are and will be available for review by individuals and municipalities, any personally identifiable information requested by the Board or the OCTV would be kept confidential.

COMMENT: Commenter disagrees with the cable television industry that proposed definition of complaint will lead to longer call times and be costly to the cable television industry. The cable television industry routinely makes numerous journal entries for many of the CSR calls they receive. A streamlined, efficient management of call center operations would more than likely offset any additional reporting requirements without affecting standards and costs. (Mahwah)

RESPONSE: The Board agrees that the complaint definition should have no impact on telephone traffic after a period of adjustment to the categories prescribed. However, since the Board has now received some complaint statistics from the cable television operators in the state, it appears that it is more likely that the complaints will be taken in the method that is most familiar to them and then categorized at a later date to mesh with the OCTV form. The categorization of complaints to fit the form can be accomplished in any manner that the cable television operator deems effective and the Board does not seek to require any cable television operator to handle it in any one fashion or another as long as the complaints are recorded and reported. The Board does believe that regardless of how the complaints are categorized (e.g., in an overlay fashion or a manual insertion of complaints into the OCTV form), it should have no impact on telephone traffic.

COMMENT: The Board should scrutinize any future request for rate increase to determine whether the cable television industry has used the clarification of what constitutes a complaint to increase its rates. Because the cable television industry is not a fully competitive marketplace, there is a risk that cable television company costs will be passed on to the cable television customer. Without a fully competitive marketplace, the public relies on the Board to protect it from unreasonable rate increases. (Mahwah)

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RESPONSE: The Board will fully scrutinize any future request for an increase in regulated rates to determine whether a cable television operator has justified its reasons for a rate increase.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. The amendment to N.J.A.C. 14:18-1.2 is not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporate or refers to Federal law, Federal standards or Federal requirements. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal Standards Analysis for this proposal.

Full text of the amendment follows:

N.J.A.C. 14:18-1.2 Definitions

. . .

Complaint means any written or verbal contact, including by telephone, by an assistive technology device for the hearing impaired such as TTY/TDD, a telecommunications relay service, in person, by facsimile, e-mail, or any other reasonable means, with a cable television operator in connection with any product or service it offers in which a person expresses discontent or dissatisfaction with an act, omission, product, service, service content or complement, term or condition of service.

. . .